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In the Supreme Court of the United States

OCTOBER TERM, 1980

162.20 ACRES OF LAND, MORE OR LESS, SITUATED IN CLAY COUNTY, STATE OF MISSISSIPPI, AND F.E. UITHOVEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether alleged noncompliance by federal officials with the mandate of Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, presents a legally sufficient defense to the condemnation of private property under the Declaration of Taking Act, 40 U.S.C. 258a, which provides that "[u]pon the filing said declaration of taking and of the deposit in the court * * * of the estimated compensation * * * title * * * shall vest in the United States * * * and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation * * * shall vest in the persons entitled thereto * * *."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 639 F. 2d 299. The opinion of the district court (Pet. App. 21-31) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1981 (Pet. App. 38-39). A timely petition for rehearing was denied on April 15, 1981 (Pet. App. 40-42). The petition for a writ of certiorari was filed on May 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were owners of property near the Tombigbee River in Clay County, Mississippi. Petitioners' former

property, which contains a four-room, one-story, nineteenth century dwelling known as Cedar Oaks, is within the area once occupied by the abandoned riverfront town of Barton (ca. 1848-1870). In connection with the Tennessee-Tombigbee Waterway Project, authorized by the Rivers and Harbors Act of 1946, ch. 595, 60 Stat. 634, 635,[1] the United States Army Corps of Engineers intends to incorporate petitioners' property into the "Barton Ferry Recreation Area," an area that will also include the abandoned riverfront towns of Colbert (ca. 1830-1847) and Vinton (ca. 1849-1900?). Cedar Oaks and the Barton townsite are listed on the National Register of Historic Places as within the Tombigbee River Multi-Resource District, a zone created for the purpose of listing historic sites in the project area (Pet. App. 2-3).

In July 1977, the Corps gave notice to petitioners that it intended to acquire their property for use in the Barton Ferry Recreation Area. Petitioners thereafter submitted to the Attorney General of the United States an "Application to Exclude Property from Condemnation Proceeding." The application explained that petitioners used the land as a tree farm, and that their crop was ready for harvest.[2] The application further stated that petitioners had previously established campsites on the property, that they had permitted church and youth groups to camp on the property without charge, and that they intended to establish additional

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[1]Congress has appropriated $984.9 million for contruction of the project since fiscal year 1971: $1 million (FY 1971), $6 million (FY 1972), $12 million (FY 1973), $18 million (FY 1974), $37.9 million (FY 1975), $101 million (FY 1976), $104 million (FY 1977), $172 million (FY 1978), $156 million (FY 1979), $165 million (FY 1980), and $212 million (FY 1981).

[2]Petitioners had originally scheduled a timber sale for December 1975. When the Corps realized the adverse impact that a timber cut would have on the aesthetics of the area (which was to be used for recreational purposes), the Corps obtained a delay of the sale. Thereafter, in July 1976, the Corps purchased the timber rights for $63,000.

campsites. Petitioners asked to be permitted to continue to develop the property at their own expense for public recreation, timber production, and for maintenance of their own residence. The application declared that petitioners' property was not essential to the project; petitioners explained that the property of another landowner, lying south of petitioners' property (and omitted from the proposed condemnation), was equally suitable for use as camp grounds. The application was not granted (Pet. App. 3-5).

On February 14, 1978, the United States filed a complaint and declaration of taking, together with a deposit of estimated just compensation covering petitioners' property. Ten days later, the district court entered a judgment on the declaration of taking (Pet. App. 3-5). Thereafter, on April 6 and 14, 1978, petitioners filed answers that raised four defenses (see Pet. App. 5, 21- 22, 24-26) to the taking: (1) that the complaint did not state a cause of action; (2) that the complaint did not contain a short and plain statement of the use for which the property is taken; (3) that there was no public necessity for the taking; and (4) that the government had failed to comply with the provisions of the National Historical Preservation Act of 1966 ("NHP Act"), 16 U.S.C. 470 *et seq.*

After a hearing, the district court granted the government's motion to strike these defenses (Pet. App. 32-33). With respect to the fourth defense, the court stated that (*id.* at 27-28), "[t]he government does not contend that the Corps of Engineers is not required to comply with the [NHP] Act[, but] * * * that the Corps is now in compliance therewith." The government contended only, as the court noted (*id.* at 28; emphasis added), "that it is not required to comply with the [NHP] Act *before* it can exercise the right of eminent domain in the action sub judice." Based on a stipulation as to the amount of compensation that would be due if the government had the legal right to condemn the

property, the court entered a final judgment on August 19, 1980 (Pet. App. 34-37).

The court of appeals affirmed in part, vacated in part, and remanded (Pet. App. 1-20). The court held (*id.* at 14-16) that alleged noncompliance by federal officials with the mandate of the NHP Act is not a legally sufficient defense to a condemnation under the Declaration of Taking Act, 40 U.S.C. 258a. The court of appeals also held, however, that a district court in condemnation may require compliance with the NHP Act, and either withhold possession by the government or take appropriate injunctive action to enforce its order (Pet. App. 18). Noting (*id.* at 19-20) that the government had argued on appeal that it had in fact fulfilled its duty under the NHP Act (and had submitted numerous documents to show that it had done so), the court of appeals remanded the case to the district court so that the district court could determine in the first instance whether compliance had occurred.

ARGUMENT

1. The Declaration of Taking Act 40 U.S.C. 258a-258e, was enacted by Congress to enable the federal government to secure prompt transfer of title to property, free of technical defenses.[3] Thus, when the United States files a declaration of taking and deposits the estimated compensation in the registry of the district court, title to the estate described in the declaration immediately vests in the United States. *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 340 (1963); *United States* v. *Dow*, 357 U.S. 17, 23 (1958); *United States* v. *Miller*, 317 U.S. 369, 381 (1943). Once title vests under

[3]We note at the outset that the decision below does not conflict with any previous decision of this Court or of any other court of appeals. Although petitioner contends (Pet. 33) that the decision below conflicts with the Florida Supreme Court's decision in *Seadade Industries, Inc.* v. *Florida Power & Light Co.*, 245 So. 2d 209 (1971), that case involved only questions of Florida condemnation law.

the Act, the district court lacks the power to dismiss the proceedings (*United States* v. *Cobb*, 328 F. 2d 115, 116 (9th Cir. 1964); *United States* v. *2,974.49 Acres (Clarendon County, South Carolina)*, 308 F. 2d 641, 643 (4th Cir. 1962)), and title cannot be revested, either by the government's dismissal of the condemnation petition (*United States* v. *Carey*, 143 F. 2d 445, 450 (9th Cir. 1944)), or by the district court's dismissal of the petition because of, for instance, want of prosecution (*United States* v. *Hayes*, 172 F. 2d 677, 679 (9th Cir. 1949)).

Because condemnation proceedings rest upon the sovereign's exercise of its power of eminent domain, the only defense[4] that may be considered is lack of authority. See, *e.g.*, *Catlin* v. *United States*, 324 U.S. 229, 240-241 (1945).[5] Here, Congress has clearly authorized the project for which

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[4]Because the sovereign may not be sued without its consent (*United States* v. *Sherwood*, 312 U.S. 584, 590 (1941)), a landowner may not file a counterclaim in a condemnation proceeding brought under Fed. R. Civ. P. 71A (*United States* v. *6.321 Acres of Land, Etc., Suffolk County*, 479 F. 2d 404, 406-407 (1st Cir. 1973); *United States* v. *3,317.39 Acres, Etc., Jefferson Co., Ark. (Ark-Mo Farms)*, 443 F. 2d 104, 106 (8th Cir. 1971), cert. denied, 404 U.S. 1025 (1972)). Of course, a landowner may file an independent action to enforce other statutes.

[5]The cases upon which petitioners rely (see Pet. 10) merely illustrate this principle. In *United States* v. *10.69 Acres of Land, Etc., Yakima County*, 425 F. 2d 317 (1970), the Ninth Circuit held that the government lacked authority to condemn unallotted Indian tribal land (which it held in trust for a tribe), without first complying with certain administrative procedures that had been expressly imposed by Congress. Likewise, in *Maiatico* v. *United States*, 302 F. 2d 880 (D.C. Cir. 1962), the court held that the Administrator of the General Services Administration had no authority to acquire a building in the District of Columbia that was not within the "taking area" defined by Congress in Section 7(a) of the Public Building Act of 1959, 40 U.S.C. 606(a), and for which GSA had not obtained approval from the House and Senate Committees on Public Works, as required by the statute.

petitioners' property was taken,[6] and nearly $1 billion has been appropriated for the project. See page 2, note 1, *supra*. Thus, petitioners' only proper defense to the taking, lack of authority, was correctly rejected by both courts below.

2. The National Historic Preservation Act of 1966 ("NHP Act"), 16 U.S.C. 470f, is a procedural statute designed to protect our nation's cultural heritage by assuring that a good faith consideration of preservation values is made before the federal government takes or permits an action that could damage or destroy properties listed on the National Register. The NHP Act is addressed to federal action; it neither enhances nor diminishes the rights of property owners. Thus, preservation of a structure is not required simply because it is listed (or is eligible for listing) on the National Register. A private property owner remains legally free to alter, or even destroy, his own structure.

With respect to the relationship of the Declaration of Taking Act and the NHP Act, three points emerge. First, as is the case under the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321 *et seq.* (which requires consideration of environmental factors in federal decisionmaking), the technical transfer of title by condemnation is, for purposes of the NHP Act, a "neutral" act that does not result in any adverse impact on property.[7] Second, as the courts have

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[6]The history of this project has been extensively reviewed by the courts. See *Environmental Defense Fund, Inc.* v. *Corps of Eng. of U.S. Army*, 492 F. 2d 1123, 1127-1128 (5th Cir. 1974), aff'g 348 F. Supp. 916 (N.D. Miss. 1972); *Environmental Defense Fund, Inc.* v. *Alexander*, 614 F. 2d 474 (5th Cir. 1980), cert. denied, No. 80-95 (Oct. 20, 1980).

[7]The court of appeals correctly noted (Pet. App. 16 n.5) that other courts had held that compliance with NEPA is "irrelevant" to the validity of a taking under the Declaration of Taking Act. See *United States* v. *178.15 Acres of Land, More or Less, Grayson County, Virginia*, 543 F. 2d 1391 (4th Cir. 1976); *United States* v. *255.25 Acres of Land, More or Less, Monroe County, Missouri (Moutray)*, 553 F. 2d 571 (8th Cir. 1977).

held in circumstances where NEPA has appeared to conflict with provisions of other statutes, it is clear that Congress did not intend to repeal by implication any other statutes, including the Declaration of Taking Act, when it enacted the NHP Act. See, *e.g., Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 548 (1978); *Flint Ridge Development Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976). Third, as the court of appeals clearly understood (Pet. App. 16-20), the policies of the Declaration of Taking Act and the NHP Act are not irreconcilable. Thus, the Declaration of Taking Act allows the government to acquire immediate title to property, upon the filing of a declaration of taking and the deposit of estimated just compensation, and a properly-filed declaration of taking should not be frustrated by any defenses, other than lack of public use or lack of legislative authority to take. See, *e.g., Berman* v. *Parker*, 348 U.S. 26 (1954). In the event that condemnation may threaten the cultural values addressed by the NHP Act, the Declaration of Taking Act provides a remedy: the court may withhold physical possession and enjoin construction or any activity that may disturb the cultural or physical environment, pending compliance with the congressional mandate. 40 U.S.C. 258a. Likewise, the court has the equitable power to enjoin a project when the government has not complied with the NHP Act. These avenues are sufficient to enable the court to preserve the status quo pending compliance with the NHP Act, without doing violence to the Declaration of Taking Act.

Here, the court of appeals declined to determine whether the Corps had in fact complied with the NHP Act in this case. Instead, the court remanded the case so that the district court could determine in the first instance whether compliance had occurred. In these circumstances, the present case is not ripe for review. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327,

328 (1967); *San Diego Gas & Electric Co.* v. *San Diego*, No. 79-678 (Mar. 24, 1981), slip op. 10-11. The controversy between petitioners and the United States may be fully resolved by the district court on remand, without any necessity for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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